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## Terrorism and International Law: Cure the Underlying Problem, Not Just the Symptom

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TERRORISM AND INTERNATIONAL  
LAW: CURE THE UNDERLYING  
PROBLEM, NOT JUST THE SYMPTOM

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I. INTRODUCTION

Terrorist activities are not of recent origin on the international plane. They have been around since the beginning of humanity. Although international law may not be accused of addressing the issue of terrorism with levity, it was after the 9/11 terrorist attacks on the United States that the international community's efforts toward fighting terrorism garnered more strength and attention.

The debatable critical question is whether terrorism under international law should be studied and treated as a specific subject in developing the legal norms and principles for its fight and regulation, or whether terrorism should be fought and regulated based on the already existing relevant international legal norms and principles. We favor the later approach. Terrorism like piracy, torture, genocide etc. should be examined within the context of the already existing framework of international law, because it does not, as of the present time, have clear legal norms. Terrorism has become one of the top ranking problems threatening the peace and stability of the international community and challenging international law at the present time. While the international community as a whole has not avoided addressing the challenges of this anathema, a lot still needs to be done to adequately combat terrorism. More cooperation among States and international organizations is a *sine qua non* in this direction. One major impediment to the efforts being made to contain terrorism is the inability of the international community to adopt a comprehensive and generally acceptable definition of terrorism that would capture its constitutive elements.

The objectives of this paper are: to discuss the genesis of the doctrine of war, use of force, difficulties associated with the definition of terrorism, causes of terrorism, terrorism during both armed conflict and peace time; the United Nations efforts in dealing with the definition of terrorism; the legal responsibility for acts of terrorism; and attempt to outline how best to cure the underlying problem and not just the symptoms. Hopefully these efforts will help in identifying the best ways through which the fight against terrorism may be won.

## II. THE JUST WAR DOCTRINE

The origin of the doctrine of just war can be traced to the Greeks and Romans. Greek philosophers, who had striven to bring some reason, order, and essence to their society tried to justify war on moral, religious, and legal grounds.<sup>1</sup> The Roman writer, Cicero, characterized war as if it were waged to recover lost goods.<sup>2</sup> Just war doctrine was earlier influenced by the Church's view of natural law. Even though the Romans generally believed that war was an aspect of nature and was dictated by the natural order to which man had no control, they felt that the only justification for war was an injury accompanied by lack of atonement on

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1. See Frederick Russell, *The Just War Theory in the Middle Ages*, 1 (Cambridge University Press, 1975)

2. *Id.* at 5.

the part of the wrongdoer.<sup>3</sup> Among the non-Christian societies, there were thoughts about the need for rules that would reduce the negative effects of war.<sup>4</sup> The authority of the Church merged with the authority of the State, which led to a Christian pacifism<sup>5</sup> that was later displaced by St. Augustine's view of natural law.

St. Augustine, in his natural law oriented way of thinking, espoused a just war theory under which war could not only be just, but obligatory under certain conditions.<sup>6</sup> In his analysis of the just war doctrine, St. Augustine identified the core attribute of a just war, namely, that it must be fought in order to promote or preserve peace, to punish the evil doer, or to recover possessions wrongfully taken.<sup>7</sup> He propagated war as a last resort, and reasoned that a just war must be fought by a sovereign authority.

Following St. Augustine was St. Thomas Aquinas, another philosopher who discussed the just war theory from a natural law prism. He elaborated on the work of his predecessor, St. Augustine. In answering the question of “whether it is always sinful to wage war”<sup>8</sup> in the negative, St. Thomas Aquinas identified three conditions that a just war should meet: proper authority, just cause, and rightful intention.<sup>9</sup> He was in agreement with St. Augustine that the authority to fight a just war resided with a sovereign; such war must have been triggered by a just cause, supported by the right intention of those waging the war.<sup>10</sup> The intention referred to here is the advancement of good or the avoidance of evil.<sup>11</sup> St.

3. See Von Elbe, “The Evolution of the Concept of Just War in International Law,” 33 A.J.I.L. 665, 666 (1939).

4. See Maj. Jeffrey F. Addicott & Maj. William A. Hudson, Jr., “The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons”, 139 Mil. L. Rev. 176-177 (1993).

5. See Yoram Dinstein, *War, Aggression and Self Defense*, 60, 3<sup>rd</sup> ed. (2001). Under this philosophy, there was in existence, a City of God, in which God Himself ordained wars against evil. See Von Elbe, *supra*, 668.

6. He noted that: “Just wars are usually defined as those which avenge injuries, when the nation or city against which war-like action is to be directed has neglected either to punish wrongs committed by its own citizens, or to restore what has been unjustly taken by it. Further, that kind of war is undoubtedly just which God Himself ordains.” See Mark Janis, *An Introduction to International Law*, 169, 3<sup>rd</sup> ed. (1999).

7. Thus, “[P]eace is war's purpose, the scope of all military discipline, and the limit at which all just contentions aim”. See St. Augustine, *The City of God*, (J. Healey trans.), in *Basic Texts in International Relations* 28 (Evan Luard ed., 1992).

8. See St. Thomas Aquinas, *Summa Theological*, II.2.40, quoted in *St Thomas Aquinas on Politics and Ethics*, 64 (Paul E. Sigmund, ed. & Trans., W.W. Norton & Co. 1988).

9. *Id.*, at 64-65.

10. See Von Elbe, *supra* 666; Yoram Dinstein, *supra*, 62-63.

11. The practical implication of this is that a war may be waged by a sovereign authority, and with a just cause, yet unlawful where it is fought with a wrong intention. See R.J. Araujo, *Anti-Personnel Mines and Peremptory Norms of International Law: Argument and Catalyst*, 30 *VAND Transnat'l L. J.*, 8 (1997).

Thomas Aquinas saw the need to punish both the wrongful conduct of the wrongdoer as well as his guilty mind and felt that defense of a common good was a moral obligation to the extent that inaction in the face of a threat to a common good was as sinful as an unwarranted attack.<sup>12</sup>

An important aspect of St. Thomas Aquinas's exposition of the just war doctrine is his introduction to the concept of "double effect," wherein he explained that every course of action undertaken could produce two consequences: the one that is intended and the other that is outside the intended consequence.<sup>13</sup> Thus, to determine the justness of war, an emphasis is placed more on what is intended rather than on the incidental consequence.<sup>14</sup> War attained some secularization with an increase in the European sovereign States that led to a difficulty in categorizing war. However, Francisco Suarez and Francisco de Victoria discussed the legality of use of force by States<sup>15</sup> and identified the basis of just war as a necessary to redress and defend against wrong.<sup>16</sup>

Other writers carried out further work on just war doctrine. Hugo Grotius' idea had a great impact on the doctrine of just war. He had a passion for regulated war, which led to him to enunciate the grounds upon which just war could be prosecuted, namely: self defense, enforcement of rights, reparation of injury, and punishment for wrongs.<sup>17</sup> Grotius went further to identify three classes of legal frameworks: the first was the law of nations, which he believed was founded on sovereignty; the second was natural law, which was based on nature; and the third was Christian moral theology, which he said was based on the

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12. See Frederick Russell, *supra*, 262.

13. See St. Thomas Aquinas on Politics and Ethics, *supra* 70-71.

14. This approach is objectionable, for instance, when it is applied to the fight against terrorism since, according to its tenets, a sovereign state may prosecute a war against another state, once there exists in the mind of the sovereign a right intention for so doing, even if there are evil consequences resulting from such war. The concept would seem to give support to a situation where a state abuses the human rights of individuals in the guise of fighting terrorism.

15. See Alfred Verdross & Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, in *The Structure and Process of International Law* 17, 19-20 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983).

16. See Francisco de Victoria, *De Indis et de Jure Belli*, Second Reflection, 429, para 13 (1696); Francisco Suarez, Selection from Three Works, *De Triplicia Virtute Theologica, Fide, Spe, et Charitate* (1621). Suarez maintained that the only just cause for war was a grave injustice which could not be avenged or repaired in any other way.

17. See Graham Evans and Jeffrey Newnham, *The Dictionary of International Relations*, 288 (1998).

New Testament.<sup>18</sup> Hugo Grotius's perception of just war theory was not limited to theology, but extended to rationalist considerations as well.<sup>19</sup>

It would seem that the just war theory lost its relevance following the adoption of the UN Charter, and in fact some writers have maintained this position.<sup>20</sup> However, whether wittingly or unwittingly, reference is still made by academics, authors and even political leaders, to the doctrine of just war, in their analysis of use of force.<sup>21</sup> Thus, the just war doctrine has not lost total relevance under the current international law regime.

#### A. INTERNATIONAL LAW ON THE USE OF FORCE

While it was not so clear in the various international law instruments preceding the Charter of the United Nations whether or not the use of force by states was prohibited, owing to the fact that those instruments seemed to have focused on the regulation of war,<sup>22</sup> it became glaring upon the coming into effect of the UN Charter that there is a general prohibition of the use of force in international law. This is by virtue of Article 2(4), which provides that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." As can be seen from that provision, not only is the use of force prohibited, the threat of its use is also prohibited. Despite the controversy surrounding what categories of actions by State that will amount to use of force under Article 2(4) and the varying interpretations given to the provision,<sup>23</sup> it is

18. See Mark Janis, *An Introduction to International Law*, 162-167, 3<sup>rd</sup> ed. (1999).

19. See generally Hugo Grotius, *De Jure Belli Ac Pacis*, 15, Chapter 1. Grotius dealt so much on sovereigns and their obligations in the community of sovereigns, an approach which led to the distinction between positivists and naturalists. See Robert Beck et al, eds., *International Rules: Approaches from International Law and International Relations*, 36 (1996).

20. See Yoram Dinstein, *The Rule of Law in Conflict and Post-Conflict Situations: Comments on War*, 27 *HARV J.L. & PUB. POL'Y* 877, 879-880 (2004); Interview with Michael Schmitt, Charles H. Stockton Prof. Of International Law, US Naval War College, at TJAGLCS, in Charlottesville, VA (February 22, 2008).

21. See Michael Walzer, Presentation at Radboud Universiteit Nijmegen: *War and Death: Reflecting on the Meaning of Just War Theory Today* (2007); Paul Ramsey, *War and Argument With Historical Illustrations* (Basic Books 2000) (1997); President W. Bush, Remarks on the War on Terror at Fort Bragg (June 28, 2005), available at <http://thinkprogress.org/2005/06/28/breaking-full-text-of-bush-speech>.

22. See, for example, the Covenant of the League of Nations 1919 and the Kellogg- Briand Pact 1928.

23. See Kelsen, "Collective Security Under International Law," *International Law Studies*, US Naval War College, 57;

Schachter, *International Law in Theory and Practice*, 110- 113 (1991); the *Corfu Channel Case* ICJ Reports, 1949, 4, 35. A proposal by Brazil for the inclusion of a prohibition against the "use of economic measures" against a state was rejected during the preparation of the UN Charter.

incontestable that an armed attack is a manifestation of use of force.<sup>24</sup> It then follows that a terrorist attack amounts to use of force. The language of Article 2(4) is broad enough to cover any type of military action against another State, and not only war.<sup>25</sup> The prohibition of the use of force is not sacrosanct, as it admits two exceptions: the first is the UN Security Council authorized action by virtue of Chapter VII; the second is the use of force in exercise of the right of self defense under Article 51.

### III. INTERNATIONAL HUMANITARIAN LAW AND TERRORISM

International humanitarian law has its foundation in the notion that every individual is entitled to some cognizable rights both in times of peace and war.<sup>26</sup> It is essentially the law of war between States.<sup>27</sup> International humanitarian laws exists in two categories: *jus ad bellum* which deals with the rules that govern situations when it is permissible to attack, and *jus in bello* which deals with the rules that govern behavior in situations of war.<sup>28</sup> The problem that will engage the following section of this part is whether international humanitarian law, especially *jus in bello*, is applicable to terrorism. For this purpose, we would identify terrorist activities under two regimes: terrorism during an armed conflict and terrorism in peacetime.

#### A. TERRORISM DURING ARMED CONFLICT

Despite the obvious difficulty in adopting a generally acceptable definition of terrorism,<sup>29</sup> it will not be out of place to say that terrorism is an instrument of warfare. It then follows that where terrorist acts are employed as an armed conflict strategy, then international humanitarian law or the law of armed conflict will apply, especially where the terrorism is committed on the territory of a party to the armed conflict.<sup>30</sup> The notion of international armed conflict presupposes the existence of a

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See 6 Docs. Of the U.N. Conf. on Int'l Org. 335; Goodrich Hambro and Simons, *Charter of the United Nations*, 49, 3<sup>rd</sup> ed. (1969).

24. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* 1986 I.C.J. 14 103-123.

25. See Murphy, "Terrorism and the Concept of Armed Attack in Article 51 of the UN Charter," 43 HARV INTL L. J. 41, 42.

26. See U. O. Umzurike, *Introduction to International Law*, 212 (Spectrum Books Limited, Ibadan, 2005).

27. See generally Pictet, *Humanitarian Law and the Protection of War Victims* (1976).

28. See Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on International Terror?" 7 THEORILAW 97, 100 (2006).

29. This paper is yet to attempt a definition of terrorism. This is dedicated to part II.

30. See H.P. Gasser, "Acts of Terrorism and International Humanitarian Law," 84 Int'l Review of the Red Cross, 547-570, at556 (2002).

state of belligerency between two states. There has been a lingering debate as to what will be the position, or rather, the characterization, when one of the parties to the armed conflict is not a state. Where acts of terrorism are used to initiate hostilities, whether or not the methods are lawful, such acts would be in violation of *jus ad bellum* if they are attributable to a state using the traditional methods of attribution.<sup>31</sup> It has been thought that a terrorist group that is not subject to the control of any State cannot be in violation of *jus ad bellum* and its activities do not amount to a use of force that can trigger the exercise of the right to self defense.<sup>32</sup> This view has not escaped opposition.<sup>33</sup> Where terrorism is part of an on-going armed conflict, the aspect of international humanitarian law that will apply to it is *jus in bello*.<sup>34</sup> The earlier codification of international humanitarian law was done at the Hague Peace Conferences of 1899 and 1907, and later by the four Geneva Conventions and their Additional Protocols of 1977.<sup>35</sup>

A determination of whether or not international humanitarian law or the law of armed conflict applies to terrorism taking place in the course of an armed conflict can be made by examining some of the provisions of the Geneva Conventions and its Additional Protocols. Article 33 of the Geneva Convention I provides, “no protected person may be punished for an offense [sic] he or she has not personally committed. Collective penalties, and likewise all measures of intimidation or terrorism are

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31. See Draft Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in United Nations International Law Commission, Report on the Work of its Fifty-Third Session (23 April- 1 June and 2 July- 10 August 2001) UN Doc A/56/10 (Suppl.), 1 Oct. 2001, at 29; Nicaragua case, *supra*, 115

32. See Randelz Hofer, “Article 51,” in B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2<sup>nd</sup> ed. (Oxford, OUP, 2002).

33. See C. Greenwood, “War Terrorism and International Law,” 56 *Current Legal Problems*, 515 (2003).

34. Although *jus ad bellum* and *jus in bello* are distinct aspects of general international humanitarian law, there is a close relationship between them, in that an armed attack which amounts to use of force, which is governed by *jus ad bellum* often results in armed conflict, which is regulated by *jus in bello*.

35. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (Hereinafter Geneva Convention No. I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Hereinafter Geneva Convention No. II); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Hereinafter Geneva Convention No. III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Hereinafter Geneva Convention No. IV); Additional Protocol Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Hereinafter Protocol I); Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (Hereinafter Protocol II); Additional Protocol Relating to the Adoption of an Additional Distinctive Emblem, December 8, 2005, 2404 U.N.T.S (Hereinafter Protocol III).



prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.”

Article 51(2) of Protocol I contains the following provision, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Article 4(2) of Protocol II provides, “Without prejudice to the generality of the foregoing, the following acts against the persons referred to in Paragraph 1 are and shall remain prohibited at any time and in any place whatsoever.

(d) Acts of terrorism

(h) Threats to commit any of the following acts.”

Article 13(2) of Protocol II provides, “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the purpose of which is to spread terror among the civilian population are prohibited.”

One striking difficulty from a reading of the above provisions, as they relate to terrorism during an armed conflict, is that the protection from terrorist acts granted to the civilian population is dependent on whether or not those acts are primarily intended to terrorize the civilians. In other words, where combatants carry out some military actions close to the neighborhood of the civilian population, with any purpose other than to terrorize the civilians in the course of a war, the afore-stated provisions will not apply and the combatants will not be in breach of the provisions. This, in effect, is to say that the application of the provisions is a function of the intention or objective of the military in carrying out the supposedly terrorist acts in question, and is independent of the consequences of the acts on the civilian population.<sup>36</sup> This may leave the military with much discretion to determine the purpose of its action taken during armed conflict. The protection from terrorism during an armed conflict offered by international humanitarian law as contained in the Geneva Conventions and their Additional Protocols applies only to protected persons, that is, civilians. It would appear that unprivileged combatants who are actively engaged in an armed conflict cannot benefit from this protection. International humanitarian law generally applies to

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36. This takes us back to the propositions of St. Thomas Aquinas on the doctrine of just war, precisely his concept of “double-effect.”

international armed conflicts, but to some extent it has relevance to non-international armed conflicts pertaining to national liberation and self determination.<sup>37</sup> Article 3 common to the four Geneva Conventions calls for minimal humanitarian considerations in cases of armed conflict not of international character. However, acts of violence committed by private persons or groups, which are considered terrorist acts, internal disturbances and tensions which are sporadic in character and other acts of similar nature, are outside the purview of international humanitarian law.<sup>38</sup>

It is arguable, and in fact was argued by the United States, that at the time they occurred, the terrorist acts of September 11, 2001 against the United States could not be classified as an armed conflict and so cannot be placed within the *jus in bello* regulation.<sup>39</sup> However, those acts fit into the sphere of *jus ad bellum*, as they amounted to an armed attack, giving rise to the exercise of the right of self defense by the United States. Ultimately, this tragic event in history marked the beginning of hostilities between the United States and Afghanistan, which had provided shelter for Al Qaeda. Thus, at that point, the law of armed conflict became applicable to the conflict.

Notably, in spite of what has been stated so far, there is no general agreement as to the propriety and extent of the application of the law of armed conflict to terrorism in international law. One school of thought argues that the scope of the law of armed conflict as it is presently, is inadequate to regulate modern terrorism. It is therefore suggested by the proponents of this view that the law of armed conflict be adjusted for it to be able to grapple with the challenges of contemporary terrorism.<sup>40</sup> Another contrary school of thought maintains that the rules of international humanitarian law are adequate and wide enough to regulate the gamut of terrorist activities. The representatives of this view express concern over any review of the law of armed conflict on the basis of combating terrorism, as that may have some unpleasant effects on human

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37. See Article 14 of Protocol II.

38. See Article 2 of Protocol II; *Pan American World Airways v Aetna Casualty & Surety Co.* (1974) 505 F. 2d 299; Green, "Terrorism and Armed Conflict: The Plea and the Verdict," 19 *Israel Y.B.H.R.* 131 (1989).

39. See *Hamdan v Rumsfeld*, 548 U.S. 557 (2006), where the United States Supreme Court rejected this argument.

40. See Rosa Ehrenreich Brooks, "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror," 153 *U. Pa. L. Rev.* 675, 755-760; Roy S. Schondorf, *Extra-State Armed Conflicts: Is There Need for a New Legal Regime?*, 37 *N.Y.U.J. Int'l Law & Pol.* 1 (2004); Robert Sloane, *Prologue to a Voluntarist War Convention*, 106 *Mich. L. Rev.* 443 (2007-2008).

rights.<sup>41</sup> There seems to be yet another view that queries the basis for the application of the law of armed conflict to current terrorism, arguing that terrorist acts lack the character of military threat and therefore do not merit the application of the law of armed conflict at all.<sup>42</sup>

While not testing the veracity of these positions, it should be noted that such debate as engaged by writers and commentators may contribute little or nothing to addressing the current problem of terrorism. Whether or not terrorism is viewed from the context of armed conflicts or from a combination of perspectives, one thing appears clear: the body of international law rules currently in place seem adequate to tackle the incidence of terrorism, so long as there are concerted efforts and cooperation among the subjects, as well as objects, of international law.

#### B. TERRORISM IN PEACETIME

There is always a purpose for engaging in armed conflicts. Perhaps it is in recognition of this fact that war is not absolutely prohibited in international law. Instead, rules have been put in place to regulate conduct in wartime. While the employment of terrorism in armed conflict situations is allowed as a warfare strategy, except in some circumstances, like its use on the civilian population, the same assertion cannot be made concerning acts of terrorism committed during peacetime. Professor Sompong Sucharitkul contends that peacetime terrorism, being an internationally organized crime, isolates itself from other crimes found in a single legal criminal system, and therefore should be treated separately from sporadic, individual attacks.<sup>43</sup>

Peacetime terrorism has some problematic implications on international humanitarian law. Clearly, the Geneva Conventions and their Additional Protocols apply to armed conflicts but not to “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.”<sup>44</sup> A conspicuous element of peacetime terrorism lies in the fact that it is targeted at a community of States. In the midst of the limited application of international humanitarian law to armed conflict situations, an inference could be drawn that terrorism occurring outside

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41. See Gabor Rona, “Interesting Times for International Humanitarian Law: Challenges from the War on Terror,” 27 *Fletcher F. World Aff.* 55, 57 (2003).

42. See Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 *DUKEJICIL* 429, 430-431.

43. See Sompong Sucharitkul, “Applicable Law in International Terrorist Threats and Attacks and the Consequences of Error in Personam,” 11 *Ann. Surv. Int'l & Comp. L.* 107, 111 (2005).

44. See Motley, *Terrorist Warfare: Formidable Challenges*, 9 *Fletcher F.* 295, 297 (1985).

war situations is regulated by anti-terrorism conventions,<sup>45</sup> supplemented by international criminal law.

Some aspects of humanitarian law do apply to armed conflicts as well as to peacetime.<sup>46</sup> A suggestion has been made to treat those categories of terrorism as the “peacetime” equivalent of war crimes.<sup>47</sup> However, this approach, if adhered to, may not have good implications. For example, because it entails the application of the law of armed conflict to outside-war-theater-terrorism, it will confer some entitlements on terrorists, such as the status of prisoners of war. In addition, it would increase the incidence of insurrection, treating insurgents as combatants, rather than as common criminals.<sup>48</sup>

#### IV. DEFINING TERRORISM

The problem with a meaningful discussion of international law of terrorism stems from the difficulty of a proper examination of the phenomenon itself. It is a mistake to suppose that merely by describing a group or entity as terrorist, one is formulating its capacity in law. The conventional approach to solving a problem has been to first understand its nature, which includes its definition. This approach should equally apply to terrorism. Unfortunately, terrorism in international law has no generally acceptable definition, because efforts at defining terrorism have fallen short of adopting a definition that is generally acceptable to

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45. See, for example, International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS 11081, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention and Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, I.M.O. Doc. SVA/CON/15; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 482; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 U.N.T.S. 284; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 124; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270, 2178 U.N.T.S. 228.

46. See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Article 1.

47. See *Sing v Bihar*, 2004 SOL Case No. 264, April 2, 2004, para. 16, available at <http://supremecourtsonline.com> (where the court affirmed a conviction under the Indian Terrorist and Disruptive Activities Act 1987 of some individuals who, while heavily armed, attacked some police officers. See also M.P. Sharf “International Law Weekend Proceedings: Defining Terrorism as the Peacetime Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?” 7 *ILSA Journal of Int’l. & Comp. Law* 391, 398 (2002).

48. See Michael Scharf, “Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects,” 36 *CWRJIL* 359, 372-373 (2004).

the international community. It is ironic that a concept, or rather, a problem that has a large implication in international security is met with this fate. The general feeling among scholars seems to be that the task of evolving and adopting a definition of terrorism acceptable to international law is not achievable. Thus, so many expressions,<sup>49</sup> funny as they may be, have been crafted by writers and commentators to reflect the impossibility of reaching an agreed to definition of terrorism.

Notwithstanding the absence of a comprehensive definition of terrorism, it would be naive and destructive to conclude that terrorism lacks a core meaning.<sup>50</sup> The importance of a universally acceptable definition of terrorism cannot be overemphasized, as such definition would enhance intelligence sharing and international cooperation, and bring harmony and unity of purpose in the fight against terrorism.<sup>51</sup> The search for a legal definition of terrorism has led some states to adopt as criminal, acts that do not reveal the intent of the "culprit" to produce a state of terror, and in some situations, those definitions are unnecessarily broad.<sup>52</sup>

Professor Christopher Blakesley defines terrorism as: ...violence committed by any means; causing death, great bodily harm, or serious property damage; to innocent individuals; with the intent to cause those consequences or with wanton disregard for those consequences; and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, religious, or other philosophical benefit.<sup>53</sup>

This definition is neutral and includes terrorism by both State and non-State actors. It deviates from the definitions often found in the domestic

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49. For example: "The search for a legal definition of terrorism in some way resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy, and self confidence, to succeed where so many others before have tried and failed." See Geoffrey Levitt, "Is 'Terrorism' Worth Defining?" 13 OHIO N.U.L. REV. 97, 97 (1986); "What looks, smells, and kills like terrorism, is terrorism." See Sir Jeremy Greenstock, KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, General Assembly Debate on Terrorism, 1 Oct., 2001 (2001). <http://www.un.org/terrorism/statements/UKE.html>; Aaron Notebom, "Terrorism: I Know It When I See It," 81 OR.L. REV. 553, 559 (2002).

50. See Oscar Schacter, "The Extraterritorial Use of Force Against Terrorist Bases," 11 HOUS. J. INT'L L. 309, 309 (1989).

51. See Jacqueline Ann Carberry, "Terrorism: A Global Phenomenon Mandating a Unified International Response," 6 IND J. GLOBAL LEGAL STUD. 685, 711 (1999).

52. See Jordan Paust, "An Introduction to and Commentary on Terrorism and the Law," 19 Conn.L.Rev. 697, 703-705 (1987); Naomi Norberg, *supra*, 32-34.

53. See Christopher Blakesley, *Terror and Anti-Terrorism: A Normative and Practical Assessment*, 31 (2006).

laws of States.<sup>54</sup> Terrorism, according to Dinstein, constitutes “acts of violence committed to instill fear (to terrorize) [sic] a state or a social group, where the victims are chosen either at random or because of mere association with a target entity.”<sup>55</sup>

Terrorism seems to have been first used as a legal term in 1931 at the Third Conference for the Unification of Penal Law at Brussels, where it was defined as

...international use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, property or physical integrity of persons, or directed against private or state property, with the purpose of expressing or executing political or social ideas...<sup>56</sup>

By including the word “terrorism” in the definition of the concept being defined, begs the question, what is terrorism?

There have been attempts, both by the UN and international treaties to make provisions on terrorism. In 1937, the League of Nations did produce a treaty – the Convention on the Prevention and Punishment of Terrorism – following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934.<sup>57</sup> The Convention defined terrorism as “all criminal acts directed against a state and intended and calculated to create a state of terror in the minds of particular persons or a group of persons or the general public.”<sup>58</sup> This definition, although broad, contemplated terrorism committed by non-state actors and wittingly or unwittingly avoided inclusion of terrorism by State actors. Unfortunately, and perhaps not surprisingly, the 1937 Convention never entered into force, because only a few States signed it, with only India ratifying it because of its broad definition of terrorism.<sup>59</sup>

The early attempts to define terrorism through the instrumentality of treaties was followed by UN conventions, whose provisions relate to

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54. See, for example, India's Prevention of Terrorism Act, No. 15 of 2002; India Code (2002); El Salvador's Special Law Against Acts of Terrorism, Article 5.

55. See Yoram Dinstein, “Humanitarian Law on the Conflict in Afghanistan,” 96 AM. SOC'Y OF INT'L L. PROC., 23, 23 (2002).

56. See Bogdan Zlataric, History of International Terrorism and Its Legal Control, in *International Terrorism and Political Crimes* (M. Cherif Bassiouni ed.) 474, 479.

57. See V.S. Mani, “International Terrorism: Is a Definition Possible?” 18 INDIAN J. INT'L L. 206, 208 (1978).

58. See Convention for the Prevention and Punishment of Terrorism, League of Nations Doc. 546(1), M.383.1937.V (1938) (The 1937 Convention).

59. See J.G. Starke, “The Convention for the Prevention and Punishment of Terrorism,” 19 BRIT. Y.B. INT'L L. 214, 215 (1938).

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only specific acts of terrorism that occur in specific circumstances. The conventions therefore have failed to give a general definition of terrorism.

Other UN treaties that can provide insight into a definition of terrorism include conventions concerning nuclear material<sup>60</sup> and plastic explosives.<sup>61</sup> In 1997, the UN General Assembly adopted the International Convention for the Suppression of Terrorist Bombings. Without defining terrorism, Article 2 of the Convention provides that for the purposes of the Convention, a person is guilty of an offense if that person

unlawfully and intentionally delivers, places, discharges or detonates an explosive, or other lethal devices in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury or with the intent to cause excessive destruction of such a place, facility or system, where such destruction results in or is likely to result in, major economic loss.<sup>62</sup>

In 1999, another convention was adopted by the General Assembly – the International Convention for the Suppression of the Financing of Terrorism. Pursuant to its provisions, it is doubtful that the Convention gave a clear definition of terrorism.<sup>63</sup>

The United Nations has equally resorted to declarations and resolutions in its efforts to provide a definition of terrorism. Accordingly, in 1994, the General Assembly adopted the Declaration on Measures to Eliminate International Terrorism,<sup>64</sup> the applicable provision of which states,

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60. See Convention on the Physical Protection of Nuclear Material, March 3, 1980, T.I.A.S. No 11,080, 1456 U.N.T.S. 101.

61. See Convention on the Marking of Plastic Explosives for the Purpose of Detection, March 1, 1991, S. Treaty Doc. No. 103-8, 30 I.L.M. 726.

62. See International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 251.

63. The Convention makes reference to “An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex, or ; ... any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” See G.A. Res. 109, U.N. GAOR, 54<sup>th</sup> Sess., Supp. No. 49, Agenda Item 160, 3, 25, U.N. Doc. A/54/109 (1999).

64. G.A. Res. 49/60, U.N. GAOR, 49<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/49/743 (1994).

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.

In response to the 9/11 attacks on the United States, the General Assembly set up a working group to fashion a comprehensive convention on international terrorism. In its deliberations, the group proposed a general definition of terrorism.<sup>65</sup> However, this definition could not be adopted as a result of Malaysia's insistence on adding some provisions to the definition to the effect of, "peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self determination in accordance with the principles of international law shall not be considered a terrorist crime."<sup>66</sup> This insistence was responsible for the failure of the project.

Whatever definition is ascribed to terrorism, it is my position that terrorism has a core meaning. It is this core meaning that manifests in the objective elements shared by most, if not all, terrorist acts. First, the purpose of a terrorist act is to achieve an outcome of terror on its target, so the mens rea of terrorism as an act is the creation of terror.<sup>67</sup> A definition of terrorism must therefore contain this terror element for it to be objective. Such a definition would exclude acts that are carried out merely to threaten, intimidate, frighten, coerce, or for other such purposes that are less serious, which do not imply a motive of terror.<sup>68</sup> Second, terrorism is not committed only by State actors; rather, it is an act that is perpetrated by non-State actors as well. Non-State actors include private persons and groups, such as insurgents. Third, another objective element of a terrorist act is that it is aimed at achieving some

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65. The proposed definition was that: "[Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility... when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act." See Measures to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6<sup>th</sup> Comm., 55<sup>th</sup> Sess., Agenda Item 164, at 39, U.N. Doc. A/C.6/55/L.2 (2000).

66. See Surya P. Subedi, The U.N. Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law, 4 INT'L LAW F. DU DROIT INT'L 159, 163 (2002).

67. This is without prejudice to the fact that terrorism can be a war strategy, for example during an armed conflict. Except in those circumstances where its use is not permitted, the use of terrorism by combatants during an armed conflict is not prohibited.

68. See International Criminal Law, 842 (Jordan J. Paust et al eds., 3<sup>rd</sup> ed., 2007).



political, military, ideological, religious, ethnic, or other goals.<sup>69</sup> A definition of terrorism that is bereft of these elements will not be sufficient.

Thus, this paper seeks to assert that terrorism is any act or conduct borne out of political, religious, philosophical, ideological, racial, ethnic, religious or any other motive whatsoever or no motive at all, intended to cause, or capable of causing, terror in, or death or serious bodily injury on, any person, or serious damage to a State or government facility or any public infrastructure facility whatsoever, or intended to intimidate or capable of intimidating a population or part of a population, or to compel, or capable of compelling, a government or a branch of government or an international organization to do or refrain from doing an act.

#### A. CAUSES OF TERRORISM

Terrorism is caused by a number of factors. The first factor that is often linked to terrorism is politics. Dissatisfaction with government policies, or even with a particular regime can lead to terrorism. Where members of a group feel the government in power is insensitive to their welfare and that they have exhausted all other avenues to attract the attention of that regime to their plight, a resort could be made to terrorism as a way of driving home their grievances. The issue of marginalization, where a minority group feels it is being excluded from the scheme of administration plays itself out in this regard. Many, if not all, attempts at defining terrorism contain this political element. Lack of, or rather, denial of, political participation, and concrete grievances constitute a major factor that leads to the commission of terrorist acts.<sup>70</sup> But, it has been argued that the root causes of terrorism should be disregarded in consideration of the ways to combat terrorism.<sup>71</sup> This view is rather objectionable.

Closely connected to the issue of politics are economic factors. The prevalence of poverty and lack of development are other factors contributing to terrorism. Thus, structured inequalities within countries have been identified as breeding grounds for violent political movements

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69. See Beth Van Schaack, "Finding the Tort of Terrorism in International Law," 28 *Rev. Lit.* 381, 429 (2008).

70. See, generally, Martha Crenshaw, *The Causes of Terrorism*, 13 *Comp. Pol.* 379 (1981).

71. See Alan M. Dershowitz, *Why Terrorism Works* 24-25 (2002).

in general and terrorism in particular.<sup>72</sup> Social stratification and economic deprivation can lead to terrorist acts. A perception of unfairness or subordination in economic opportunities triggers terrorism.

Another aspect of the economic factor is the financing of terrorism. A successful terrorist outing has some cost implications. So, terrorists are first involved in a cost assessment of their planned activities, only proceeding if they are able to secure the necessary financing. Thus, terrorism relies on the financial market in order to thrive. This raises the issue of terrorism financing through the use of the banking system and money transfer, including money laundering. However, it has been noted that terror financing is distinguishable from money laundering in the sense that while money laundering involves illegal funds, terror financing does not necessarily have to do with illegal funds; rather “in terror financing,... the actual illegality often occurs only after the actual transfer, when the money is ultimately used for funding terrorism.”<sup>73</sup> The fact remains that there is a relationship between money laundering and the financing of terrorism.

Another cause of terrorism is religion. It has an interaction with the other factors, and in extreme cases, such as religious fanaticism, religious activists could see as enemies those states or groups of people whom they believe are opposed to their religious practices or views. They may use acts of terrorism to show their anger towards them.

## V. LEGAL RESPONSIBILITY FOR ACTS OF TERRORISM

The fact that terrorist acts are prohibited under international law is not contestable. This is notwithstanding the lack of unanimity surrounding the definition of terrorism and despite the fact that there is no comprehensive legislation proscribing acts of terrorism. Instead, what exist are bits of instruments outlawing terrorism. However, the collective effect of these instruments reveal a consensus that terrorism bodes badly for international law. It is a general principle of international law that a breach by a State of its international law obligation engages the responsibility of that State.<sup>74</sup> The obligation of a State extends to the duty not to commit acts of terrorism, and where terrorism is linked to a State, that State would be responsible for its commission.

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72. See Addressing the Causes of Terrorism, The International Summit on Democracy, Terrorism and Security, The Club de Madrid Series on Democracy and Terrorism, 20 (2005), available at <http://www.safe-democracy.org/docs/CdM-Series-on-Terrorism-Vol-1.pdf>.

73. See Amos Guiora, “Using and Abusing the Financial Markets: Money as the Achilles’ Heel of Terrorism,” 29 U. Pa. J. Int’l L. 59, 75 (2007).

74. See the Corfu Channel case (United Kingdom v Albania) 1949 I.C.J. 4, 23.

A. TERRORISM AND SELF DEFENSE AGAINST NON-STATE ACTORS

A question may be posed if Article 51 of the United Nations Charter applied to acts of terrorism. In other words, can the provision of Article 51 be invoked in response to terrorist acts. This provision provides for the exercise of the right of self-defense by a State if an armed attack occurs. The natural interpretation of Article 51 would be that self-defense is only appropriate when a State is a victim of an armed attack.<sup>75</sup> "Armed attack" is not defined anywhere in the UN Charter, perhaps because its drafters did not see any reason to do so.<sup>76</sup> It becomes pertinent to determine if terrorism amounts to an armed attack. There is no doubt that modern terrorism is committed with arms, and even sophisticated weapons.<sup>77</sup>

The disposition of the UN lends credence to the view that terrorist acts amount to armed attack. This is inferred from the two resolutions passed by the Security Council- Resolution 1368 (2001) and Resolution 1373 (2001), following the September 11<sup>th</sup> terrorist attacks against the United States, recognizing and reaffirming the inherent right of individual and collective self defense contained in the Charter of the United Nations. There is no better reading of the Security Council actions than that the 9/11 terrorist attacks triggered an affirmative right of the United States to use force in self-defense.<sup>78</sup> Terrorist attacks therefore amount to armed attacks for purposes of Article 51.

However, a more difficult problem is whether the right of self-defense in response to terrorist acts is exercisable with respect to terrorism committed by non-State actors. Would the State from which territory the terrorists operate be responsible for the conduct of the non-State actors? This issue goes to the root of State responsibility, and central to a determination of such responsibility is the principle of attribution.

A conservative interpretation of Article 51 would seem to suggest that it applies to armed attack by States to the exclusion of non-State actors,<sup>79</sup>

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75. See the Nicaragua case, *supra*.

76. See Ian Brownlie, *International Law and the Use of Force by States*, 278 (Clarendon Press, Oxford, 1963).

77. For a discussion on computer warfare, see Schmit, "Computer Network Attack and the Use of Force in International Law Thoughts on a Normative Framework," 37 *Columbia Journal of Transnational Law*, 885 (1998-1999).

78. See Chris Bordelon, "The Illegality of the U.S. Policy of Preemptive Self Defense Under International Law," *Chapman Law Rev.* 111, 119 (2005).

79. It is for this reason that it has been asserted that the two resolutions passed by the Security Council in reaction to the 9/11 attacks have added a completely new element to the concept of self defense, one that is not present both in Article 51 and the Nicaragua case examples of armed attack .

but this interpretation is expanded by the invocation of the doctrine of attribution.<sup>80</sup> The attribution principle, which applies the effective control test, essentially provides that a State is responsible for the actions of non-State-actors in its territory if that State had effective control over the non-State actors.<sup>81</sup> Thus, where a State can attribute the activities of non-State actors to the State from which territory the terrorist attacks originated, that would engage the responsibility of that State.<sup>82</sup> A prime example of this rule is in the case of United States and Afghanistan. The Taliban government provided the needed environment conducive for Al Qaeda to execute its terrorist project against the United States and there is sufficient literature supporting this view.<sup>83</sup> Therefore, in the midst of these authorities, an argument to the contrary would surely asphyxiate. Furthermore, another ground for attributing responsibility for terrorist acts committed by non-State actors to a State is where the State has failed, neglected, or refused to prevent its non-State actors from committing such terrorist acts on another State, or even where the State has lost control over its non-State actors.<sup>84</sup>

It is not always easy to establish this nexus between a State and its non-State actors or a particular terrorist group for the purpose of finding responsibility on the part of that State. This results in a State, which has been a victim of terrorist attacks by non-State actors, mounting attacks on another State that it considers as having sponsored the terrorism. This wrong imputation leads to illegal attacks, which can amount to aggression. The United States attacks on Iraq in 2003 have been condemned in the light of the foregoing analysis. It is largely believed that there was no evidence linking Iraq to the terrorist attacks of 9/11.<sup>85</sup>

The 2006 Israel-Lebanon crisis presents yet another example where a claimed exercise of a right of self-defense against terrorist attacks by

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See Maj. Jennifer Bottoms, "When Close Doesn't Count: An Analysis of Israel's Jus Ad Bellum and Jus In Bello in the 2006 Israel-Lebanon War," 2009-APR ARMLAW 23, 38 (2009).

80. See Lawrence Azubuike, "Status of Taliban and Al Qaeda Soldiers: Another Viewpoint," 19 Conn. J. Int'l L. 127, 139 (2003); Ian Johnstone, "US-UN Relations After Iraq: The End of the World (Order) as We Know It?" 15 EUR. J. INT'L L. 813,828 (2004).

81. See the Nicaragua case, *supra*, para. 99-100.

82. See Allen Weiner, "The Use of Force and Contemporary Security Threats: Old Medicine for New Ills," 59 STAN. L. REV. 415, 431.

83. See Allen Weiner, *supra*, 433; Lawrence Azubuike, *supra*, 134-136, 140.

84. This view seems to be represented in Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts. See G.A. RES. 56/83, U.N. GAOR, 56<sup>th</sup> Sess., Supp. No. 10, U.N. Doc. A/56/10 (Supp) (Dec. 12, 2001); Tom Roy, "Crossing the Thin Blue Line: An Inquiry into Israel's Recourse to Self Defense Against Hezbollah," 43 STAN. J. INT'L L. 265, 290 (2007).

85. See Mahmoud Hmoud, "The Use of Force Against Iraq: Occupation and Security Council Resolution 1483," 36 CORNELL INT'L L. J. 435, 443 (2004); UK Foreign Affairs Committee, Seventh Report of Session,200-02, Foreign Policy Aspects of the War Against Terrorism, HC, 384, para. 215; U. O. Umozurike, *supra*, 207.

non-State actors came into play. While it may appear clear that the actions of the Hezbollah guerillas against an Israeli military post amounted to use of force, it appears murky if they qualify as armed attacks giving rise to the right of self-defense.<sup>86</sup> However, the actions of Hezbollah attracted condemnation from the international community.<sup>87</sup> It was not in question that the guerillas operated from Lebanon, but could their actions be attributable to the State of Lebanon? It has been asserted that not only is Hezbollah a terrorist organization, but also a recognized political party in Lebanon, and that no faction in Lebanon is authorized by the government to carry arms except Hezbollah.<sup>88</sup> If this is the case, then Hezbollah's actions can be attributed to the government of Lebanon. Whatever assessment of the situation is to be made, it should not be forgotten that prior to the actions of the Hezbollah militants against Israel, there had been a rift between Israel and Lebanon.<sup>89</sup> Even if it is conceded that from the circumstances of the Israel-Lebanon crisis, Israel had the right of self-defense, the manner in which Israel exercised such right was illegal, considering the human casualties recorded in that operation, many of whom were innocent civilians. The attack was therefore not proportionate to the raid committed by Hezbollah on the Israeli military outpost.

## VI. INTERNATIONAL HUMAN RIGHTS AND COUNTER TERRORISM

The UN Charter has provisions that make reference to the respect for and promotion of human rights,<sup>90</sup> but there is no consensus on whether or not these provisions confer rights on individuals and whether they are legally binding or not.<sup>91</sup> Without going into details about the arguments surrounding those provisions, suffice it to say that there are now separate

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86. The I.C.J. has ruled that not every use of force amounts to armed attack. See Sean D. Murphy, "Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter," 43 HARV. INT'L L. J., 41, 44 (2002).

87. See U.N. Doc. S/PV.5488 (July 13, 2006); U.N. Doc. S/PV.5493 (July 21, 2006).

88. See Maj. Jennifer Bottoms, *supra*, 24.

89. See Wilson Lam, Hezbollah, Israel, and the Lessons of 1982, ANGUS REID GLOBAL MONITOR, July 26, 2006, available at [http://www.angus-reid.com/analysis/view/hezbollah\\_israel\\_and\\_the\\_lessons\\_of\\_1982/](http://www.angus-reid.com/analysis/view/hezbollah_israel_and_the_lessons_of_1982/); Kathryn Westcott, Who Are Hezbollah?, BBC NEWS ONLINE, Apr. 4, 2002, [http://news.bbc.co.uk/2/hi/middle\\_east/1908671.stm](http://news.bbc.co.uk/2/hi/middle_east/1908671.stm).; Andrea Levin, Death and Destruction are Hezbollah's Goals, B. GLOBE, Aug. 8, 2006, available at [http://www.boston.com/news/world/middleeast/articles/2006/08/08/death\\_and\\_destruction\\_are\\_hezbollahs\\_goals](http://www.boston.com/news/world/middleeast/articles/2006/08/08/death_and_destruction_are_hezbollahs_goals).

90. See, for example Articles 1(2,3), 13, 55, 56, and 68.

91. One school of thought argues that the provisions do not create an obligation on states, and that what the provisions confer on individuals are benefits, not rights. See H. Kelsen, *The Law of the United Nations*, 29 (1950); J. G. Starke, *International Law*, 350 (1984). The other view is that the provisions are legally binding on states. See Philip Jessup, *A Modern Law of Nations*, 91 (1949); Ezejiakor, *Protection of Human Rights*, 113 (1962); Schwelb, "The International Court of Justice and the Human Rights Clause of the Charter," 66 A.J.I.L. 337 (1972).

instruments wholly devoted to human rights. First, the Universal Declaration of Human Rights was adopted in 1948,<sup>92</sup> although as a non-binding General Assembly resolution.<sup>93</sup> The Declaration made provisions for political and civil rights, and economic, social, and cultural rights.<sup>94</sup> The Declaration has come to be considered as having a great impact on human rights.<sup>95</sup>

In 1966, the International Covenant on Civil and Political Rights (ICCPR)<sup>96</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>97</sup> were adopted, but they did not enter into force until 1976. The two Covenants drew inspiration from the provisions of the Universal Declaration of Human Rights. Among other provisions, the ICCPR states that no one shall be arbitrarily deprived of his life,<sup>98</sup> and that no one shall be subject to torture<sup>99</sup> and arbitrary arrest or detention.<sup>100</sup> Article 2 provides that State parties undertake to respect and ensure the rights provided by the Covenant to individuals are guaranteed them within their territories, and subject to the jurisdiction of each State. The ICESCR, *inter alia*, recognizes the right to work,<sup>101</sup> and to just and favorable working conditions.<sup>102</sup> It guarantees the right to form and join trade unions<sup>103</sup> and to social security.<sup>104</sup> It provides for adequate food, clothing, and housing,<sup>105</sup> and protects the family, mothers, and children.<sup>106</sup> Under the Covenant, an adequate standard of living is

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92. See G.A. Res. 217 (III), Pt. A (Dec. 10, 1948).

93. See Buergethal, "The Evolving International Human Rights System", 100 A.J.I.L. 783, 784-785 (2006); Lauterpacht, *International Law and Human Rights*, 408-417 (1950). In the words of the United States representative to the UN at the time of the adoption of the Declaration, Eleanor Roosevelt: "it is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation." See 19 U.S. Dept. of State Bull. 751 (Dec.9, 1948).

94. It recognizes the equality of all persons, both in dignity and in rights. It guarantees the right to life, liberty and security of all persons. Under the Declaration, torture or cruel, inhuman or degrading treatment or punishment; slavery, servitude and slave trade, are all prohibited. It prohibits arbitrary arrest and detention, and ensures fair and public hearing, in which the accused person is presumed innocent until the contrary is proved. Other rights are enshrined in the Declaration. See U. O. Umzurike, *supra*, 143-145.

95. See Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in *Realizing Human Rights: Moving From Inspiration to Impact* (Power and Allison, eds.) 3, 11-12 (2000).

96. 999 U.N.S.T. 171, Dec. 16, 1966 (hereinafter, ICCPR).

97. 993 U.N.T.S. 3, Dec. 16, 1966 (hereinafter, ICESCR).

98. Article 6(1)

99. Article 7

100. Article 9

101. Article 6

102. Article 7

103. Article 8

104. Article 9

105. Article 11

106. Article 10

guaranteed.<sup>107</sup> Apart from these human rights documents, there are other instruments, including those operating on a regional level that make provisions for human rights.<sup>108</sup> It is thus evident that, international law has much concern, at least theoretically, for the respect and protection of human rights.

It is incontestable that terrorism infringes upon these guaranteed human rights.<sup>109</sup> It has been asserted that “there is probably not a single human right exempt from the impact of terrorism”<sup>110</sup> and one would have thought or presumed that a move towards countering terrorism would be a way of ensuring that those human rights are protected. However, the trend of events on the international plane seems to suggest that counter terrorism is used in a way that its effects on human rights coincide with those of terrorism itself. Any measures, including legislation, adopted with a view to combating terrorism, must recognize the importance of human rights. The issues of torture, wrongful prosecution, and repression seem to be central in a discussion of the counter-terrorism- human rights link. It has been asserted that states seem to bask in the belief that as far as counter-terrorism is concerned, their actions cannot amount to terrorism.<sup>111</sup>

A situation where governments infringe on human rights, especially on a political ground, in the guise of anti-terrorism, is as condemnable as it is appalling. Cardona gives a narrative of how, in El Salvador, the police arrested, and even commenced prosecution for terrorism, members of a rural organization who had carried out a demonstration in reaction to a government's administrative program. The arrest and prosecution were even extended to a journalist who was reporting on the demonstration.<sup>112</sup> Another example is in November 2010, when people who were traveling for the Thanksgiving celebration around the United States were subjected at the airports to a terrorism security check, which entailed the passing of some radio-active lights through their bodies. This intrusive security check could have some human rights implications.

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107. Article 12. See generally, Eide, Krause & Rosas, *Economic, Social & Cultural Rights*, 2<sup>nd</sup> rev. ed. (2001).

108. See Lori F. Damrosch, et al, *International Law: Cases and Materials*, Chap. 13 (Minnesota, 2009).

109. See William O'Neill, “Terrorism and Human Rights, in *Human Rights, The United Nations and the Struggle Against Terrorism*,” 1, 3 (International Peace Academy, 2003).

110. See U.N. Econ. & Soc. Council, Sub-Comm. On Promotion & Prot. of Human Rights, *Terrorism and Human Rights: Progress Report*, P. 102, U.N. Doc. E/CN.4/Sub.2/2001/31 (June 27, 2001).

111. See Mirna Cardona, “El Salvador: Repression in the Name of Anti-Terrorism,” 42 *CNLILJ* 129,137 (2009).

112. *Id.* at 145-146.

Furthermore, some counter-terrorism laws contain provisions that are clear violations of human rights.<sup>113</sup> There were complaints against the United States from the International Committee of the Red Cross indicating how the United States military authorities inflicted torture on and degrading treatment of Iraqi detainees in the aftermath of the 9/11 attacks.<sup>114</sup> There were also arbitrary detention of non-United States citizens, secret deportation hearings for persons suspected of having connections to terrorism, authorization of military commissions to try non-citizens accused of terrorism, and military detention without charge or access to counsel of United States citizens considered as “enemy combatants.”<sup>115</sup>

While observing that terrorist acts constitute serious violations of human rights, the immediate past Secretary-General of the United Nations, Kofi Annan recognized the human rights implications of counter terrorism measures. He cautioned, “...our responses to terrorism, as well as our efforts to thwart it and prevent it should uphold the human rights that terrorists aim to destroy...”<sup>116</sup> Similarly, the General Assembly's 2004 resolution on human rights and terrorism recognizes that terrorism is a violation of human rights and should be fought in a such a way that complies with international norms.<sup>117</sup>

In the efforts to combat terrorism, security and human rights have been treated as if they were mutually exclusive. This should not be so. Essential to the element of security is the protection of human rights at all times. Those entrusted with the security of the State and who, with that authority, assume the role of fighting terrorism, should not have the misguided impression that the rising wave of terrorism warrants fighting back with whatever means necessary, including violating human rights in the process. Granted, national security is a public concern for public benefit, and in some situations, overrides private interest. However, what

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113. For example, Article 8 of El Salvador's Special Law Against Acts of Terrorism prescribes a five to ten year jail term to anyone who publicly “justifies terrorism or incites another or others to commit any of the crimes listed in the law.” This could lead to a denial of, and an infringement on, the right to freedom of speech. See Mirma Cardona, *Id.*, 139.

114. See Int'l Comm. of the Red Cross, Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation (2004), available at [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.htm](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm).

115. See Human Rights Watch, World Report 2003: United States, <http://www.hrw.org/wr2k3/us.html>.

116. See Press Release, The Secretary General, All Must Work Together to Counter Terrorism, Prevent Spread of Weapons of Mass Destruction, Secretary General Says, U.N. Doc. SG/SM/8624-SC/7680 (Mar. 6, 2003), available at <http://www.un.org/News/Press/docs/2003/sigsm8624.doc.htm>.

117. See Human Rights and Terrorism, G.A. Res. 59/195, U.N. GAOR, 59<sup>th</sup> Sess., preamble, U.N. Doc. A/RES/59/195 (2004).



constitutes public interest is the sum total of the individuals' rights. State security is ultimately for the benefit of the individuals. Of course, a State is an abstraction and does not exist in a vacuum. However, if the individuals, the ultimate beneficiaries of public security and security from terrorism, are subjected to violations of their rights due to counter-terrorism, then comparable to the evils of terrorism, a vicious cycle of violence will have been established. Therefore, whatever effort is geared towards combating terrorism should make the issue of the protection of human rights its prime consideration.

## VII. EFFORTS AT FIGHTING TERRORISM: UN COUNTER-TERRORISM MEASURES

Some measures have been initiated by the UN to combat terrorism. Numerous international conventions and other instruments have been adopted to fight terrorism, but it remains to be seen if these initiatives have really produced tangible results. In 2004, the former UN Secretary-General, Kofi Annan, constituted the High-level Panel on Threats, Challenges, and Change<sup>118</sup> to address the issue of international threat and security. Part of the Panel's recommendations on terrorism included a proposed definition of terrorism and a comprehensive global strategy for combating it. In this regard, efforts are to be made at reversing the causes and facilitators of terrorism by the promotion of social and political rights, the rule of law, and democratic reform. The United Nations should also address major political grievances. Included in the recommendations is the need for the United Nations to develop better instruments for global counter-terrorism cooperation, which would equally respect civil liberties and human rights.

As a follow-up to the Panel's recommendations, the Secretary-General, Kofi Annan, in his keynote address at the International Summit on Democracy, Terrorism, and Security on March 10, 2005, recognized and included those recommendations in his plan of action.<sup>119</sup> In 2005, the General Assembly adopted a Global Counter-terrorism Strategy,<sup>120</sup> which

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118. See Kofi Annan, Foreword to Secretary -General's High-level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility VIII* (2004), available at <http://www.un.org/secureworld/report2.pdf>.

119. These include: efforts to deter the disaffected from using terrorism as a means of achieving their goals; to deprive terrorists of the means to carry out their attacks; to dissuade states from supporting terrorists; to develop the capacity of states to prevent terrorism; and to protect human rights in the fight against terrorism. See Kofi Annan, The Secretary-General, United Nations, *A Global Strategy for Fighting Terrorism*, Keynote Address to the Closing Plenary of the International Summit for Democracy, Terrorism and Security (Mar. 10, 2005), available at <http://english.safe-democracy.org/keynotes/a-global-strategy-for-fighting-terrorism.html>.

120. UN Action to Counter Terrorism, [http:// www.un.org/terrorism/strategy-counter-terrorism.html](http://www.un.org/terrorism/strategy-counter-terrorism.html).

required every state to implement and fully cooperate with all General Assembly and Security Council resolutions aimed at combating terrorism. The strategy also required states to address the conditions conducive to the spread of terrorism, to undertake measures to prevent and combat terrorism, and to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. States are encouraged, under the Strategy, to contribute to measures strengthening the role of the United Nations towards fighting terrorism.<sup>121</sup>

International organizations also contribute to countering terrorism. The World Bank and International Monetary Fund have intensified their initiatives on anti-money laundering and combating the financing of terrorism.<sup>122</sup> These initiatives have been taken in recognition of the fact that money laundering is a means of financing terrorism. These measures still need to be supported with other efforts from all quarters of the international community in order to achieve the set objectives.

#### A. HOW BEST TO COMBAT TERRORISM (CURING THE UNDERLYING PROBLEM)

The fact that terrorism still persists despite the efforts made to combat it is perhaps a revelation of the inadequacy of those measures. It also underscores the need for a more viable, results-oriented approach to solving the problem of terrorism. There remains the great need to find the right causes of the underlying problems and not just focus on their symptoms. The United Nations Organization has been on the forefront, without success, to come up with a universal and comprehensive definition of terrorism. This definition would serve as a yardstick against which violent actions would be gauged to determine whether or not they amount to terrorism.

For more than fourteen years, the United Nations has battled with this task through committee work, resolutions, and calls for concerted State actions to fight the problem. The inability of States to adopt a Comprehensive Convention on International Terrorism, which would provide an adequate definition of terrorism owing to unnecessary parochial interest, should be deprecated.

Solving the problem of terrorism calls for a multidimensional approach and does not lie in using only military action, which can only cure the

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121. UN Global Counter-Terrorism Strategy, G.A. Res. 60/288, ¶ 2, U.N. Doc. A/Res/60/288/Annex (Sept. 8, 2005).

122. See Matthew Levitt, *Iraq, U.S., and the War on Terror, Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 SPG FLETCHER F. WORLD AFF. 59 (2003).

symptoms of terrorism – the outward manifestation – and not the problem itself. It is one thing to recognize the need to tackle terrorism using a complex approach – as the UN has observed in the recommendations of the High-level panel – and it is another thing to take bold steps in the direction of combating terrorism. There is a need for a change in the way people perceive terrorism. This change can be achieved by campaign, both at the grassroots and upper levels. This change is where the role of NGOs and other international organizations becomes indispensable. This paper places much premium on this approach.

Having found a link between politics and terrorism, it becomes crucial that those who control the machinery of government should be committed to democracy. A periodic election is a necessary tool for achieving democracy. It is time leaders discarded the idea of clinging to power at the displeasure of the governed. The recent happenings in Egypt are still fresh in our minds, and those of Libya are even fresher. They are the conditions that breed terrorism, especially when the individuals feel that the government is being supported by a foreign State.

Governments and financial institutions should be more vigilant over, and where necessary, place stricter monitoring, on the transfer of funds. To the extent permissible by international law, states should be more cautious in the area of international trade, so as not to allow the movement of arms, which can be used for terrorist purposes. There is a need for promotion of international cooperation in criminal matters, especially as it pertains to terrorism. Criminal sanctions still have a deterrent purpose, in spite of whatever objections trail its application. States and individuals should see themselves as stakeholders in the task of combating terrorism.

Above all, counter terrorism should not be divorced from human rights; rather, both are complementary and should be adopted in the cause against terrorism. Anything to the contrary would lead to abuse and denial of human rights, which would have a negative impact on the task at hand. In fact, the efforts at combating terrorism should be given a human rights approach. Human rights bodies should increase their participation and should liaise with other stakeholders to achieve a terrorism-free international community.

### VIII. CONCLUSION

It is important to emphasize one thing: the position of this paper has not been to write off the efforts so far made by the international community, especially the United Nations, toward combating terrorism. Rather, this

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paper calls for more activism on the part of States, individuals, and international organizations for their commitment in the cause against terrorism. Until this is done, “uhuru,” (which means “freedom” in Swahili) does not exist and only then can the international community go ahead and beat its chest that it has won the war against terrorism.